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SUPREME COURT, U.S.

NO. 77-6673

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

THE STATE OF TEXAS

v.

ZACKARY C. BROWN

Appeal from the County Court at Law Number Two
El Paso County, Texas

APPELLANT'S REPLY TO THE MOTION OF THE STATE OF TEXAS TO DISMISS OR AFFIRM

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In its Motion to Dismiss or Affirm, the State of Texas has contested only one point, and that is whether this case presents a substantial federal question.

Appellant contends that Section 38.02 of the Texas Penal Code is unconstitutional because it is overbroad and vague, because it punishes silence as a form of expression, because it allows an invasion of privacy, and because it takes away one's right to silence under police questioning. The State essentially counters with the position that the intrusion made legal by the statute is modest, is not burdensome, and is, therefore, constitutional.

The point presented in essence by this appeal is whether in this country one who is not under arrest for any crime, who is not suspected of having committed a crime, who is walking alone, who is otherwise unknown to the police, who is not evasive, and who did not witness any crime or civil wrong may walk away from police officers and refuse to answer any questions, even those regarding identity and residence, at a point before being placed under arrest.

The issue raised by Section 38.02 is not new. In 1928, dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928), Justice Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed to be a violation of the Fifth.

The "right to be let alone" is important. The books are replete with efforts on the part of the sovereign to intrude into a person's privacy. Those intrusions are invariably called necessary and are usually described as modest. And this Court has usually been vigilant to strike down many of those provisions recognizing that if we were ever to lose our freedom and liberty completely, the loss would occur not at once but rather by a gradual erosion of the principles of the Constitution. The sovereign often invites this Court to examine only a particular case rather than to place the law in question within the broader context of a series of laws which noticeably limit a person's rights, much like the case of a man who was killed by a thousand pin pricks and then trying to determine the cause of death by examining each pin prick individually.

So, in this case the State is telling this Court that one does not have the right to refuse to give one's name or address, since such a requirement would by itself involve only a modest intrusion.

In United States v. Brignoni-Ponce, 422 U.S. 873, 880, 883 (1975), this Court was invited by the Government to allow it to stop anyone near the Mexican border and inquire about their citizenship when those persons appear to be of Mexican ancestry. Justice Powell wrote for the majority:

> The intrusion is modest. The Government tells us that a stop by a roving patrol 'usually consumes no more than a minute....' According to the Government, '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'
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> Although we may assume for purposes of this case that the broad congressional power over immigration ... authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

So unless there is reasonable suspicion that a crime has been committed, this Court does not allow random stops for questioning away from the border or its functional equivalent. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); and United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

Those who propose those "minor" intrusions by Government often cite Terry v. Ohio, 392 U.S. 1 (1968), in support of

limited stops and searches. The State has cited Terry in their statement in this case. Terry, however, provides no shelter for the statute in question here. Terry simply represents a decision made by this Court to allow police officers a measure of safety while they investigate a subject. In Terry, the officer had some suspicions that Terry and two others were "casing a job, a stick-up," and the officer also feared that the trio was armed. A brief pat-down turned up a revolver and resulted in a gun prosecution. The limited search based on something less than probable cause was justified simply to protect the life of the police officer. No one in this case claimed to be in fear or to harbor any suspicions about Appellant. The majority in Terry did not address the facts of the case presented here, but Justice White in his concurring opinion did, and he wrote the following at page 34:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

The right to silence described by Justice White is nearly absolute. Not only does silence not furnish a basis for arrest, silence may not be considered at all even as inferential evidence of guilt. Griffin v. California, 380 U.S. 612 (1965); Doyle v. Ohio, 426 U.S. 610 (1976); and United States v. Hale, 422 U.S. 171 (1975).

The right to remain silent was the first right mentioned by this Court in Miranda v. Arizona, 384 U.S. 436, 479 (1966).

he list of rights which must be told to a person who is rived of his freedom in any significant way and who is ques- ed. In view of all the publicity about the Miranda deci- , one could expect that the public might believe that one indeed have the right to remain silent. If one has the t to remain silent after arrest, surely the invocation of right prior to arrest should not furnish the basis for arrest itself so that the officer can then advise the stee that he then had the right to remain silent. Thus, position of the State of Texas here is that one must be sted in order to have the right to remain silent, a thor- ly confusing and obviously illogical contention.

In its analysis the State has failed to note the distinc- n between police action found warranted in situations where izens were not called upon to perform an act or compelled speak, and those cases where persons were punished for ir failure or refusal to do something which was protected the Constitution.

With the possibility of a very narrow exception recognized this Court in border cases, no one may be compelled to break ence or be punished for silence. It is much the same as the nciples that one may not be compelled to produce his private ers, Boyd v. United States, 116 U.S. 616 (1886). Nor may be punished for invoking a constitutional right, Camara v. icipal Court, 387 U.S. 523 (1967); and See v. City of Seattle, U.S. 541 (1967).

The compulsion exacted by the Texas statute in this case s afoul of both the Fourth and Fifth Amendments because it pels speech when the Constitution protects silence, and it o invades one's right of privacy. See Boyd v. United States,

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supra; United States v. Chadwick, 433 U.S. 1 (1977); and Katz v. United States, 389 U.S. 347 (1967). Clearly this case presents several substantial federal questions. The questions presented may be even more substantial if other states have similar statutes.

Perhaps this case is an example of those cases noted by this Court in Terry, of which minority groups complain and which constitute the systematic harassment of a minority group--* in this case, blacks. While the exclusionary clause will not stop that improper conduct, the use of a vague state statute used to punish innocent conduct should not be condoned.

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* This Court in Terry noted in a footnote the possibility that police agencies might use harsh police methods to impose their "rule" in minority areas.

> The President's Commission on Law Enforcement and Administration of Justice found that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by "[m]isuse of field interrogations" increases "as more police departments adopt 'agressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." Id., at 184. While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer ... it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." Ibid.

For all the foregoing reasons, as well as for those stated in his Jurisdictional Statement, Appellant urges this Court to note probable jurisdiction in this case, to demand briefs, and to set the case down for full hearing and argument.

Respectfully submitted,

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Certificate of Service

I do hereby certify that on this 28th day of July, 1978, a true and correct copy of the foregoing Appellant's Reply to the Motion of the State of Texas to Dismiss or Affirm was mailed to Honorable John L. Hill, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711.

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